

**STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION DIVISION**

**IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION FOR
THE PURPOSE OF CONSIDERING:**

**APPLICATION OF DELAWARE ENERGY, LLC
FOR AUTHORIZATION TO INJECT SALT WATER
FOR PURPOSES OF DISPOSAL THROUGH ITS
PROPOSED BEAR TRAP SWD #1 WELL, EDDY
COUNTY, NEW MEXICO.**

**CASE NO. 16258
Consolidated for purposes of hearing with**

**APPLICATION OF DELAWARE ENERGY, LLC
FOR AUTHORIZATION TO INJECT SALT WATER
FOR PURPOSES OF DISPOSAL THROUGH ITS
PROPOSED GIANT PANDA SWD #1 WELL, EDDY
COUNTY, NEW MEXICO.**

**CASE NO. 16259
Consolidated for purposes of hearing with**

**APPLICATION OF DELAWARE ENERGY, LLC
FOR AUTHORIZATION TO INJECT SALT WATER
FOR PURPOSES OF DISPOSAL THROUGH ITS
PROPOSED GRIZZLY SWD #1 WELL, EDDY
COUNTY, NEW MEXICO.**

CASE NO. 16260

DELAWARE ENERGY, LLC’S REPLY IN SUPPORT OF MOTION TO DISMISS

Delaware Energy LLC (“Delaware”) respectfully submits this reply in support of its motion to dismiss Foundation Minerals, LLC, Mavros Minerals, LLC, and Oak Valley Mineral and Land, L.P. (collectively, “Foundation Minerals Group”) from Case Nos. 16259 (Giant Panda SWD #1) and 16260 (Grizzly SWD #1). For the reasons stated at hearing in support of the oral motion and herein below, Delaware’s motion should be granted, and Foundation Minerals Group should be dismissed from Case Nos. 16259 and 16260. Delaware withdraws its motion to dismiss Foundation Minerals Group from Case No. 16258.

I. Foundation Minerals Group is Not a Party to Case Nos. 16259 & 16260; It Should Be Dismissed and its Objections Set Aside.

Under the Division’s rules, “parties” to an adjudicatory proceeding are limited to (i) the applicant; (ii) “a person to whom statute, rule or order requires notice (not including those persons to whom 19.15.4.9 NMAC requires distribution of hearing notices, **who are not otherwise entitled to notice of the particular application**), who has entered an appearance in the case”; and, (iii) “a person who properly intervenes in the case.” 19.15.4.10(A) NMAC (emphasis added). The Foundation Minerals Group does not meet any of the foregoing definitions of a party under the Division’s rules.

First, Delaware, not Foundation Minerals Group, is the applicant.

Second, Foundation Minerals Group is not “a person to whom statute, rule or order requires notice[,]” in Case Nos. 16259 and 16260. *See* 19.15.4.10(A)(2) NMAC. Contrary to Foundation Minerals Group’s contention, the fact that the Division may have given notice to Foundation Minerals Group does not establish that it has standing. *See* Resp. at 7. Division rules expressly exclude from the definition of a “party” persons to whom notice is given by the Division “who are not otherwise entitled to notice of the particular application.” 19.15.4.10(A) NMAC (emphasis added). Thus, whether Foundation Minerals Group received notice from the Division of the hearing in these cases is not determinative; the analysis turns on whether Foundation Minerals Group was “entitled to notice of the particular application.” In Case Nos. 16259 and 16260, it was not entitled to notice.

Under Division regulations governing applications for disposal wells, notice is required to “each owner of the land surface on which each injection well or disposal well is to be located and to each leasehold operator or other affected person within any tract wholly or partially contained within one-half mile of the well.” 19.15.26.8(B)(2) NMAC (emphasis added); *see also*

19.15.2.7(A)(8) NMAC (“Affected persons” means “(a) the operator, as shown in division records, of a well on the tract, or . . . the designated unit operator; (b) in the absence of an operator . . . each working interest owner whose interest is evidenced by a written conveyance document . . .” or, as pertains to these cases, “(c) as to any tract or interest therein that is not subject to an existing oil and gas lease, each mineral interest[.]”).

As confirmed through its witness’s own testimony, Brian Arnold Jr., Foundation Minerals Group is not an owner of land surface on which any of Delaware’s proposed injection wells are located. *See* Hearing Tr. at 245:10-14.

Foundation Minerals Group also is not a leasehold operator within the area of review for any of Delaware’s proposed injection wells. *Id.* at 245:20-25 (“We’re not a leasehold operator, but we have correlative mineral rights in the area.”).

And, to the extent Foundation Minerals Group owns mineral interests, potentially making it an “affected person” under Division rules, those interests fall only within the area of review and relate only to the Bear Trap SWD #1 and the Grizzly SWD #1 wells in Case Nos. 16258 and 16260, respectively. *See id.* 240:18-242:5 (identifying MRC Permian Co. as the affected party that should have received notice, not Featherstone Development Corp.); 245:15-25 (testifying that if MRC Permian Co.’s lease has expired, then Foundation Minerals Group is the affected party). Foundation Minerals Group was unable to confirm at the hearing whether it was an affected party under Division rules in either Case No. 16258 or 16260. In its response in opposition, it still has not confirmed that it is an “affected person” in Case Nos. 16258 or 16260 under Division rules (or Case No. 16259, for that matter). As to Case Nos. 16259 and 16260, Foundation Minerals Group has not made that showing because it cannot—the facts do not support it.

Upon review of the fee leaseholds at issue, Delaware’s contract landman has confirmed through a review of public filings and Division records that MRC Permian Company (“MRC Permian”) remains the valid leasehold operator of the subject fee interest in the area of review for the Grizzly SWD #1 in Case No. 16260. *See* **Exhibit A**, affidavit of Brandon Gianfala, attached hereto. Accordingly, MRC Permian, not Foundation Minerals Group, is an affected person in Case No. 16260, because MRC Permian remains the leasehold operator. However, it does appear that MRC Permian’s leasehold interest in the fee tract offsetting the Bear Trap SWD #1 well has lapsed. That lapse makes Foundation Minerals Group an affected party for notice purposes in Case No. 16258, and, because it filed its entry of appearance, a party to that proceeding pursuant to 19.15.2.7(A)(8)(c) NMAC. *See id.* Delaware accordingly withdraws its motion to dismiss Foundation Minerals Group from Case No. 16258.

Third, Foundation Minerals Group has not filed a written notice of intervention in Case Nos. 16259 and 16260. Even if it had, or if the Division accepts its response in opposition to Delaware’s motion to dismiss as written notice of intervention in those cases, Foundation Minerals Group has not, and cannot, established a basis for intervention. The facts and equity simply do not support it.

II. Foundation Minerals Group Has No Basis to Intervene in Case Nos. 16259 & 16260; It Should Be Dismissed and its Objections Set Aside.

Foundation Minerals Group is not a proper intervenor in Case Nos. 16259 and 16260 under 19.15.4.11(A) NMAC. That rule, which governs intervention in adjudicatory proceedings, provides that “a person with standing with respect to the case’s subject matter may intervene by filing a written notice of intervention[.]” 19.15.4.11(A) NMAC (emphasis added). Foundation Minerals Group did not file a written notice of intervention. And, most significantly, it has not,

and cannot, establish a basis for standing to intervene—a necessary precondition to intervention—in these cases.

The factors Foundation Minerals Group cite in support of intervention fail to demonstrate a factual or legal basis to intervene. As the Oil Conservation Commission recently held, a person seeking to intervene in a case must establish as a precondition to intervention that their alleged potential injuries are within the zone of interest to be protected by the statutes and rules governing the application and adjudicatory proceeding to demonstrate standing. *See* Order R-10987-A(2), ¶ 22. Alternatively, they must show that its proposed witnesses have the “special expertise to contribute substantially” to the prevention of waste or the protection of correlative rights to meet the standard for permissive intervention. *See id.* (emphasis added); 19.15.4.11(C) NMAC (providing that the Division may strike a notice of intervention if the intervenor fails to show standing “unless the intervenor’s participation will contribute substantially to the prevention of waste [or] protection of correlative rights[.]”). Foundation Minerals Group cannot meet either standard.

Foundation Minerals Group contends its participation “would contribute substantially” to the prevention of waste and the protection of correlative rights, as if it still has an opportunity to present additional evidence and testimony on those issues. Resp. at 6 (referring to its participation as if it had not yet occurred). But Foundation Minerals Group already had an opportunity voice its objections and demonstrate a basis for standing and to “contribute substantially” to the prevention of waste and protection of correlative rights. It offered no evidence or testimony on how Delaware’s applications would result in waste. Its response in opposition to Delaware’s motion to dismiss also cites no evidence or testimony in the record that

could possibly be construed as relating to waste. Foundation Minerals Group has made no contributions to the record regarding protection of waste.

The only testimony or evidence offered by Foundation Minerals Group relating to protection of correlative rights indicated that Foundation Minerals Group might be an affected person under Division rules in Case Nos. 16258 and 16260 because MRC Permian's fee leases with the areas of review may have lapsed. In fact, only the MRC Permian lease at issue in Case No. 16258 appears to have lapsed, making Foundation Minerals Group a party entitled to notice only in that case. *See* Exhibit A. Having entered its appearance in Case No. 16258, however, Foundation Minerals Group is a proper party to that proceeding and need not act to intervene.

As to Case No. 16260, Foundation Minerals Group offered no testimony or evidence to demonstrate how its alleged correlative rights will be adversely affected by Delaware's application. Similarly, nothing in the record supports a finding that Foundation Minerals Group offered, or could possibly offer, any evidence or testimony to support intervention in Case No. 16259.

Finally, Foundation Minerals Group failed to explain how its concerns about a purported business deal with 3Bear to potentially develop salt water disposal wells on its ranch property falls within the Division's "zone of interests to be protected" by Division regulations governing injection. *See* Order R-10987-A(2), ¶ 22. As the Division Examiner made clear at the hearing, "business relationships and things like that have no" bearing on the Division's determinations in these cases; the Division is "looking at the Safe Drinking Water Act, not about business models and whatnot." *See* Hearing Tr. at 73:5-9. Foundation Minerals Group also offered no evidence, testimony or argument substantiating its vague allegations of harm raised in its prehearing and

amended prehearing statements. It offered no evidence or testimony regarding what its alleged injuries would be if the Division were to grant Delaware's applications.

In summary, Foundation Minerals Group objected to Delaware's applications, forced Delaware to proceed to hearing, but then failed to present evidence, testimony or argument to establish a basis for its objections, a right to intervene, or even a reason to deny Delaware's applications. Failure to put on any substantial evidence or testimony of any kind confirms that Foundation Minerals Group's purpose is to prejudice Delaware through delay. Having achieved that goal, at least since May 2018 (when Foundation Minerals Group first protested these wells requiring them to go to hearing), Foundation Minerals Group should not be further rewarded now by being granted party status in Case Nos. 16259 and 16260 where it has failed to establish even the most rudimentary elements necessary to intervene.

III. Reliance on 3Bear's APD is Misplaced and Unavailing.

In support of its alleged harm, Foundation Minerals Group points to 3Bear's proposed Foundation Minerals SWD #1 well as "the first well the Mineral Companies have planned for [its] Ranch" to demonstrate it has an interest that will be adversely affected by Delaware's proposed wells, which offset Foundation Minerals Group's Black River Ranch. *See Resp.* at 6. But the purported plan to develop wells on its ranch is too speculative and uncertain to substantiate a basis for standing.

After learning by May 2018 of Delaware's plans to drill and operate numerous salt water disposal wells in the area around Black River Ranch, Foundation Minerals Group has demonstrated nothing to support its claim that it plans to drill and develop salt water disposal wells on its property. It points to a business relationship with 3Bear, but 3Bear has still filed only an APD at this point for a single injection well. It has taken no action to file competing C-108s. Most significantly, 3Bear, as the putative applicant and operator of the proposed Foundation

Minerals SWD #1 well on Foundation Minerals Group's ranch no longer opposes Delaware's applications in Case Nos. 16258-16260. It has withdrawn its appearance and opposition to the applications. *See* **Exhibit B**, attached hereto. If the applicant of the APD which Foundation Minerals Group points to as the basis for its alleged injury has withdrawn its protest and objection, it is unclear what standing Delaware Minerals Group has to object to Delaware's applications. Under the Division's rules governing "affected persons," Foundation Minerals Group has no standing.

Moreover, Foundation Minerals Group has only ever alleged that it plans to work with 3Bear to drill and operate injection wells on its ranch. Those purported plans are not concrete; in fact, they are highly speculative and ill-defined. Despite having had the opportunity, it never put on any evidence or testimony to outline its plans, demonstrate that the plans are confirmed, or that any money or planning has been actually invested into their development. It never submitted testimony about other proposed locations for planned wells giving rise an alleged injury. The alleged harm to Foundation Minerals Group is far too speculative and uncertain to support standing for intervention.

To the extent Foundation Minerals Group could even establish injury on the basis of the first of 3Bear's planned wells, the location for its proposed Foundation Minerals SWD #1 well is approximately 2.4 miles from the Giant Panda SWD #1 (Case No. 16259) and 2.7 miles from the Grizzly SWD #1 (Case No. 16260). Those distances are well outside the area of review for Delaware's proposed injection wells and, consequently, beyond the range at which harm to Foundation Minerals Group can be reasonably supported. In fact, Foundation Minerals Group submitted no evidence or testimony to substantiate any such harm with respect to any of Delaware's proposed wells.

Foundation Minerals Group had the opportunity to give testimony and evidence substantiating its plans and its alleged injury to demonstrate standing. Having failed to do so when given the opportunity to be heard on its objections the only possible conclusion to be drawn is that Foundation Minerals Group cannot show injury because its plans remain unformed and speculative. It should be dismissed from these cases and not awarded party status.

CONCLUSION

For the reasons stated, Delaware's Motion to Dismiss Foundation Minerals Group from Case Nos. 16259 and 16260 should be granted. Foundation Minerals Group's oral notice of intervention should be stricken or denied, and its objections to Delaware's applications set aside.

Respectfully submitted,

HOLLAND & HART LLP

/s/ Adam G. Rankin

Michael H. Feldewert, Esq.

Jordan L. Kessler

Adam Rankin

Julia Broggi

Post Office Box 2208

Santa Fe, New Mexico 87504-2208

(505) 988-4421

(505) 983-6043 Facsimile

mfeldewert@hollandhart.com

jlkessler@hollandhart.com

agrankin@hollandhart.com

jbroggi@hollandhart.com

**ATTORNEYS FOR DELAWARE ENERGY,
LLC**

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018 I filed with the Oil Conservation Division and served a copy of the foregoing document to all counsel of record via Electronic Mail to:

Seth C. McMillan
Kaitlyn A. Luck
P.O. Box 2307
Santa Fe NM 87504-2307
505-982-3873
smcmillan@montand.com
kluck@montand.com

**Attorney for Foundation Minerals,
LLC, Mavros Minerals, LLC, and
Oak Valley Mineral and Land, L.P.**

Marion J. Craig III, Esq.
Marion J. Craig III Attorney at Law, LLC
P.O. Box 1436
Roswell, New Mexico 88202-1436
(575) 622-1106
Jimmy@craiglawllc.com

**Attorney for Jim & Barbara Davis and
Alisa Ogden**

/s/ Adam G. Rankin
Adam G. Rankin